

FITZGERALD'S SUCCESSFUL ARGUMENT TO KEEP THE BUSH AND CHENEY REPORTS OUT OF DISCOVERY

Back in the discovery period leading up to Scooter Libby's trial, Ted Wells made a valiant attempt—based on Fitzgerald's notice that he was going to include reference to the insta-declassification of the NIE—to get Bush and Cheney's interview reports in discovery. But, as far as I can tell from the available record, Wells failed. Fitzgerald argued that, so long as he was willing to stipulate that the leak of the NIE on July 8 was not illegal, then any discovery of the Bush and Cheney reports would count as Jencks, and therefore he would only be obligated to turn them over if the government called Bush or Cheney to testify.

Given the fact that Mukasey appears to have claimed he can't reveal the reports for some crazy reason, I thought I'd lay out this argument. Nowhere does Fitzgerald explain that he **couldn't** turn over the reports—only that he doesn't think he has to, unless Judge Walton orders him to do so.

MR. WELLS: Your Honor, with respect to the issue of the NIE, as Your Honor knows, Mr. Libby testified that he had discussions with Ms. Miller concerning the NIE based on expressed instructions from the vice president and with the understanding that President Bush had declassified the document. This is a case that concerns unauthorized disclosure of classified material. To the extent that Mr. Fitzgerald is in possession of documents or grand jury material or interviews that establish that, in fact, the vice president and

the president were aware that those documents had been declassified, he should turn them over because I do not want to be in a position during this trial that there is some question that Mr. Libby, in disclosing that material to Ms. Miller, did anything wrong.

THE COURT: But the government is not alleging any violation of the law regarding that.

[snip]

THE COURT: You are not challenging whether there was a declassification of that information at the time it was produced?

MR. FITZGERALD: We're not challenging the declassification authority as of July 8. What he is asking now is Jencks. And that's what we kept writing in our briefs, we don't turn over Jencks material before trial. Now we're asking for grand jury testimony. It is not an issue. The NIE is not mentioned in the indictment. We are not alleging to the jury that Mr. Libby is guilty of disclosing classified information and committed a crime that they should vote on by discussing the NIE. So I don't see why we should then turn over whatever material that might exist that would fall under the category of Jencks.

Now, part of what's going on here is that Wells is trying to get Fitzgerald to agree that **none** of Libby's NIE leaks were illegal, so he can shore up the giant holes in Libby's cover story about the NIE. You see, it's clear that—even according to Libby's testimony—he didn't have Presidential insta-declassification authorization to leak the NIE to Bob Woodward on June 27 and David Sanger on July 2. Which, as Ted Wells recognizes, strongly suggests that the insta-declassification had nothing to do with

the NIE, but instead pertained to Valerie Wilson's identity (and probably, the CIA trip report). So Wells tries to get Fitzgerald to agree that Libby was always authorized to leak the NIE—in exchange, the implication is, Wells will drop the demand for the Bush and Cheney interview reports. Fitzgerald responds by coming awfully close to asserting that the insta-declassification must have related to Valerie Wilson, since that's what was uniquely leaked on July 8.

MR. WELLS: I couched the request as Brady, and Brady trumps Jencks. But if the government is representing that they are not going to challenge what will be my strong representations to the jury that he was authorized by the vice president with the understanding that the president also had declassified the document and he did nothing wrong but following instructions, if he's not going to challenge that, then I don't need it. That's why I want it.

THE COURT: That's what you're saying. You're not going to challenge that.

MR. WELLS: No. What he said, he put in there, he slipped something in. He said as of July 8, because the government knows that one might make it —

THE COURT: But that was the conversation that he had with Ms. Miller on July 8.

MR. WELLS: Right. But the government knows there may be, there is certainly an argument that the government could make that there was an earlier conversation with somebody else maybe 10 days earlier. My math may be off.

THE COURT: Is the government going to be seeking to introduce the earlier disclosure?

MR. FITZGERALD: Your Honor, I'll say this and I'll be very clear. I think

there may have been two earlier disclosures that we're not alleging or a crime that's not the focus. We didn't charge it. But what I want to be clear is –

THE COURT: Are you going to seek to introduce any type of evidence regarding that even though it's not charge?

MR. FITZGERALD: Yes. Let me explain how it came up. In a meeting I think six days before July 8 Mr. Libby testified that he recalled that he was given the specific authority for identification and that he checked, in fact, he checked with the vice president because he was concerned. He checked with someone else as to the lawfulness but said that this was the first time that he was authorized to describe particular language in the, a particular quote. It didn't turn out that he had talked to a reporter I think six days before and it came up and he testified and it's not going to be a big focus but it is in the grand jury. He said, well, either the declassification occurred earlier than I recalled it because he said it was before July 8th or I made a mistake or it was someone else out there. That was in the grand jury and he was examined about it. It wasn't followed up upon. We're not charging a violation.

THE COURT: How is it relevant then?

MR. FITZGERALD: Only to the extent that if Mr. Libby had an instruction to tell information to Ms. Miller on July 8 and he's saying the instruction reflected in his notes to tell me Judith Miller refers to the NIE. He says he did not discuss Mr. Wilson's wife that day. To our understand both were discussed.

As Judge Walton appears increasingly inclined to

approve Wells' request for any information pertaining to this issue, Fitzgerald says he's got no "documents or exhibits" on the issue. To which Wells responds that Fitzgerald does have interview reports—the Bush and Cheney interview reports currently at issue.

THE COURT: I understand you're saying it's not a focus. But I think I need to understand whether you are going to seek to introduce evidence about it because I'm having a hard time understanding how that would be relevant.

MR. FITZGERALD: I will come back to that. Let me jump ahead. There's no other discovery we have on it so it's not like we're sitting on documents or exhibits that —

THE COURT: It is a moot issue. You don't have anything on it.

[snip]

MR. WELLS: I started out making what I characterized as a Brady request to the extent that either the vice president or the president have testified that they did authorize disclosure.

THE COURT: Testified?

MR. WELLS: I'm making a Brady request. I believe there is testimony. I believe there is testimony or interviews.

THE COURT: I didn't know they had testified.

MR. WELLS: I don't know the procedure whether they talked to somebody in somebody's office. But to the extent he has statements from either the vice president or the president, to the extent that disclosure of the NIE was authorized and I believe that maybe that the testimony does not tie it down to a particular day, only that it did take place, I believe I'm entitled to that.

All I asked Mr. Fitzgerald from the beginning is are you going to put this stuff in just because of background, because it happened. If you're not contending that there is anything wrong with it, I don't need the Brady. I can open on it with comfort. But if he's laying back and going to say, ah, got you, I have a right, I believe, if such testimony exists, to know it.

And once Walton does agree that Fitzgerald should turn over the evidence (that is, the interview reports), Fitzgerald manages to get him to agree to a stipulation instead of turning over the interview reports.

THE COURT: I think it would be material to the defense for the government to let you know any information they have about the declassification process for this information.

MR. WELLS: Thank you.

THE COURT: So I would require that that information, if the government has it, be produced pursuant to Rule 16.

MR. WELLS: Thank you.

THE COURT: Any other matters on the motion to disclose? I do have some other things I need to discuss with you.

MR. FITZGERALD: Your Honor, one quick question. In what form because I don't want to come back? In other words —

THE COURT: Obviously if you think that there is a CIPA issue in reference to it, I guess we would have to do it through a Section 4 filing but it seems to me that they do have a right to know because if they decide to go down that path to bring out information about those other events. Even if you decide not to, they should know the mine field that they might be going into.

MR. FITZGERALD: Your Honor, I think they already do. Let me see if I can – in other words, if I summarize the information and disclose it as to what we know about this information, I mean there was an authority to declassify it. We don't know when. So I don't know what more there is to that in the sense that I'll scrub it. But it's not as if we're sitting on – we have turned over relevant documents and items but that's the way it is.

THE COURT: Very well.

[snip]

MR. FITZGERALD: Your Honor, I will stipulate that the declassification happened. I don't know when. The notion that we're laying low in the tall grass and weeds I think is unfair.

It appears that the final resolution to this exchange was that, based on Fitzgerald's stipulation that the NIE was declassified as of July 8 and his representation that Libby's own grand jury testimony was the most incriminating piece of evidence the government had WRT the NIE (and note, precisely this section was redacted from Libby's grand jury testimony as entered at trial), the government did not have to turn over the interview reports.

THE COURT: I understand that he might open the door in some way that would cause you to have to bring in some information but it seems to me that, if you have any information right now that you know would potentially undermine Mr. Libby's credibility or suggest something sinister on his part if he brings out information about these earlier events, then it seems to me he has a right to know that.

MR. FITZGERALD: And he has it. It is the grand jury transcript. It is not a big

deal. It is his client saying I'm not sure if I had the authority when I talked on July 2nd or not, and he has it. But it is not a focus.

But note this final exchange. Walton asks Fitzgerald to reaffirm that he has nothing indicating Libby didn't have the authority to leak the NIE to Judy on July 8. But Fitzgerald refuses to concede that he has nothing that definitively shows Libby did not have authority.

THE COURT: You don't have anything that would definitively show that he did not have authority.

MR. FITZGERALD: As to the timing, no, I don't have anything that sets the date other than before, my belief is it is before July 8th. Besides saying July 8 it happened by, I can't move the date into June or July, a specific date.

Just a couple of points about this. First, Fitzgerald never makes an assertion that the cannot turn over the interview reports, based on some kind of agreement with Bush or Cheney.

But he clearly doesn't want to turn over those reports. He argues that it's is Jencks—that is, a statement made to the government that it would need to turn over if it called the witness who made the statement, but which doesn't otherwise have to be turned over. But Wells argues it's Brady evidence—evidence that is specifically exculpatory; Wells has reason to believe that Cheney and Bush went along with the insta-declassification story. Ultimately, Walton leans towards disclosure so as to avoid Libby's team introducing material or a witness (specifically, Woodward) which would also introduce incriminating material about Libby. But Fitzgerald asserts he has nothing that "would definitively show that [Libby] did not have authority" to leak the NIE "as to the timing." And based on those representations—and

Fitzgerald's stipulation that he agrees the NIE was insta-declassified before July 8—it appears that Fitzgerald avoided turning over those reports.

So why did Fitzgerald appear so opposed to turn over those reports in May 2006, though he appears willing to turn them over to Congress now? (And Mukasey is going to some length to avoid turning them over?)

If, as Ted Wells believed, Bush or Cheney said straight out, "Oh yeah, I insta-declassified the NIE and nothing but the NIE," I can see why Fitzgerald wouldn't want the reports introduced at trial—but it wouldn't really have hurt the case in chief. But there appears to be something more there—something that Fitzgerald believes might harm Libby's NIE cover story—but on terms other than the timing. The reports that Cheney authorized Libby to get the whole story out might be considered such incriminating material. But why not turn that over to Libby?